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No. 99-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

DISTRICT INTOWN PROPERTIES LIMITED PARTNERSHIP, ET AL.,
Petitioners,

v.

DISTRICT OF COLUMBIA, ET AL.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When analyzing a governmental regulation of property for Takings Clause purposes, how should courts determine the relevant unit of property in a case where a landowner owns several geographically contiguous parcels, only some of which are burdened by the regulation?

2. Does a governmental regulation of property that requires a landowner to leave eight contiguous lots in a completely undeveloped state as a grass lawn deny "all economically beneficial or productive use of land" within the meaning of *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992)?

PARTIES TO THE PROCEEDING

Petitioners District Intown Properties Limited Partnership, William Calomiris, and Peter Calomiris, were the appellants in the court below. Respondents District of Columbia, District of Columbia Department of Consumer and Regulatory Affairs, and Anthony A. Williams, in his official capacity as Mayor of the District of Columbia, were the appellees in the court below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners District Intown Properties Limited Partnership, William Calomiris, and Peter Calomiris respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the D.C. Circuit is reported at 198 F.3d 874 and reproduced in the appendix hereto ("App.") at 1a. The opinion of the District Court for the District of Columbia is reported at 23 F. Supp. 2d 30 and reproduced at App. 29a.

JURISDICTION

The judgment of the D.C. Circuit was entered on December 17, 1999. App. 1a. On March 2, 2000, the Chief Justice

extended the time to petition for certiorari to and including April 17, 2000. App. 46a. The jurisdiction of the D.C. Circuit was based on 28 U.S.C. § 1291. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Takings Clause of the Fifth Amendment to the United States Constitution provides: "[N]or shall private property be taken for public use without just compensation."

STATEMENT OF THE CASE

Petitioners, District Intown Properties Limited Partnership and its two partners, William Calomiris and Peter Calomiris, are the owners of nine contiguous lots (designated as Lots 106-114) in Washington, D.C., facing Connecticut Avenue northwest of its intersection with Cathedral Avenue. Cathedral Mansions South, a rental apartment building designed in the 1920s by architect Harry Wardman, is located on Lot 106. There are no buildings or other structures on Lots 107-114, which are instead maintained as a grass lawn. Petitioners purchased Cathedral Mansions South and the eight acres of surrounding property in 1961. At that time, the apartment building and the lawn comprised a single lot. In June 1988, however, the District of Columbia granted petitioners' application to subdivide the original parcel into the nine present lots. App. 1a, 3a, 29a.

In December 1988, petitioners applied for permits to build one single-family townhouse on each of the eight vacant lots. In March 1989, the zoning and structural engineering divisions of the District of Columbia Department of Consumer and Regulatory Affairs ("DCRA") granted zoning approval for the construction. That same month, however, opponents of the project filed a petition to have Cathedral Mansions South designated an historic landmark. In May 1989, the District's Historic Preservation Review Board ("Review Board") granted the petition and declared not only the

apartment building, but also the adjacent lawn area, an historic landmark.[1] Petitioners' building permits were thus referred to the Review Board for its consideration. App. 3a-4a, 29a-30a.

In March 1992, the Review Board recommended denial of petitioners' permit applications as inconsistent with the landmark designation. Petitioners sought review of that determination before the DCRA, which acted as the Mayor's agent. In March 1993, however, the DCRA agreed with the Review Board that petitioners' permit applications should be denied. In so doing, the DCRA concluded that "any construction destroying the lawn" would be incompatible with the historic landmark status of the eight lots. D.C. Cir. J.A. 368. The DCRA also purported to hold that the denial of petitioners' permits would not cause them to suffer economic hardship or result in an unconstitutional taking of their property. The District of Columbia Court of Appeals, however, held that this "holding" was beyond the DCRA's statutory jurisdiction and therefore would have no preclusive effect in any subsequent litigation. *See District Intown Properties, Ltd.* v. *District of Columbia Dep't of Consumer & Regulatory Affairs*, 680 A.2d 1373 (D.C. 1996). App. 4a-5a, 31a-32a.

Petitioners then filed suit under the Takings Clause of the Fifth Amendment and 42 U.S.C. § 1983 against the District of Columbia, the DCRA, and the Mayor, alleging that the

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[1] Petitioners supported the designation of Cathedral Mansions South as an historic landmark but objected to the designation of the lawn. D.C. Cir. J.A. 44. As Judge Williams of the D.C. Circuit commented, "[a] cynic might suspect that the alleged relationship between the lawn and the Cathedral Mansions apartment is little more than a cloak by which the citizens of Upper Northwest Washington have secured some parkland on the cheap. Parks are good, but the Fifth Amendment says that taking them is not." App. 26a-27a.

denial of their permit applications constituted a regulatory taking of property for which just compensation was required. Relying on *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992), petitioners argued that the DCRA's determination that there could be no construction disturbing the lawn deprived the property of all economically beneficial or productive use and thus effected a taking. App. 5a, 32a.

The District Court recognized that, in analyzing petitioners' takings claim, it "first has to identify the relevant parcel of property * * * so that it can assess whether the governmental deprivation has been total or partial." App. 36a-37a. Applying a multi-factor balancing test, the District Court concluded that the "the relevant parcel is a singular lot consisting of the apartment building and the lawn." App. 38a. Based on that conclusion, the District Court ruled that the property, as so viewed, had not been deprived of all value because Lot 106 contains "an apartment building that produces rental income and that possesses market value." App. 39a. The District Court therefore granted summary judgment in favor of respondents. App. 45a.

The D.C. Circuit affirmed. The court acknowledged that under *Lucas*, "regulations pursuant to which the government denies *all* economically beneficial or productive use of property" result in "a 'categorical' or *per se* taking." App. 7a (emphasis in original). The court also recognized that

> we must first define what constitutes the relevant parcel before we can evaluate the regulation's effect on that parcel. In the instant case the question is: Does the relevant parcel consist of the property as a whole or do the eight lots for which construction permits were denied constitute the relevant parcels? [App. 8a.]

Like the District Court, the D.C. Circuit held that "all nine lots should be treated as one parcel for the purpose of the court's takings analysis." App. 9a. The D.C. Circuit noted that "[t]he District Court used several factors to determine

the relevant parcel: the degree of contiguity, the dates of acquisition, the extent to which the parcel has been treated as a single unit, and the extent to which the restricted lots benefit the unregulated lot." App. 8a. The D.C. Circuit approved the District Court's consideration of these factors as "eminently sound" and "mirror[ing]" the approach taken by some other courts in regulatory takings cases. App. 9a.

Applying the various factors, the D.C. Circuit determined that the first three factors pointed in favor of treating all nine lots as a single parcel, stating that "[t]he lots are spatially and functionally contiguous. District Intown purchased the property as a whole in 1961 and treated it as a single indivisible property for more than 25 years." App. 9a. The court was not swayed by petitioners' "intentional act" of subdividing the original lot in 1988. App. 9a. With respect to the fourth factor, the economic synergy between the parcels, the court said that "[w]hile there is a dispute as to whether the adjacent landscaped lawn increases the apartment building's value," this factor was outweighed by "application of the other three factors." App. 9a. The D.C. Circuit also gave no weight whatsoever to the fact that "the District of Columbia has taxed Lots 107 through 114 at a higher rate since subdivision, reflecting the District of Columbia's assessment that these lots are vacant developable land." App. 12a.

Having determined that all nine lots should be deemed one unit of property for takings analysis, the D.C. Circuit rejected petitioners' *Lucas* claim on the ground that, because the apartment building is valuable, the property as a whole had not been deprived of all economic value. App. 13a. The D.C. Circuit did not stop there, however. The court went on to hold in the alternative that, even if the eight vacant lots were to be viewed separately from Lot 106, petitioners' *Lucas* claim would still fail. The court acknowledged that "[t]he record contains a finding by the Mayor's agent that any construction that destroyed the lawn would be incompatible with the lawn's status as a historic landmark," but

held nevertheless that "the record does not support the conclusion that Lots 107 through 114 are rendered 'valueless' by the regulation at issue." App. 13a. The D.C. Circuit did not identify what economically productive uses the property could be put to while subject to requirement that it be kept as a grass lawn.

Judge Williams concurred in the judgment. He sharply criticized the "prevailing" Takings Clause analysis such as employed by the majority as "elevat[ing] formal concepts over economic reality and tend[ing] to strip the Clause of its potential for fulfilling the framers' likely purposes." App. 17a. He also "note[d] the ways in which modern interpretation of the Takings Clause, as exemplified in today's decision, impairs its role as a disincentive to wasteful government activities." App. 19a. Nevertheless, Judge Williams joined in the outcome of the case because "[t]he majority's disposition is—with one important exception—in general accord with the current opinions of the Supreme Court." App. 17a.

Judge Williams strongly disagreed with the multi-factor analysis applied by the majority for determining the relevant parcel, stating that the considered factors "strike me as uninformative and largely irrelevant" as they "focus[] on marginal issues and largely overlook[] the more critical concern of synergies." App. 24a, 28a. As Judge Williams further explained:

> The first factor, contiguity, is clearly necessary but in no way sufficient. The next two factors—simultaneity of acquisition and unity of use—are more troublesome. Both elevate history—either the historical purchase or the historical use—over the real-world present relationship between the tracts. The majority's focus on the property's use prior to regulation tells us nothing about the value-producing opportunities foreclosed at the time of regulation. The majority mentions but brushes aside a fourth factor—the extent to which the regulated parcel

> benefits the neighboring lot. Yet this appears the most relevant. The more a burdened tract in its regulated use benefits contiguous property, the less likely that the regulation has a negative impact. [App. 24a-25a (citations and quotations omitted).]

Finally, Judge Williams took issue with the majority's alternative holding that, even if the Lots 107-114 were to be seen as units separate from Lot 106, the eight lots had not been deprived of all economically viable uses. Noting that "the Mayor's own agent found that 'any construction that destroyed the lawn would be incompatible with the lawn's status as an historic landmark,' " App. 28a (quoting the majority, App. 13a), Judge Williams reasoned that "[i]t is hard to imagine what 'economically viable' use that constraint leaves, unless the majority means that the very barest thread of value, yielded by some thoroughly bucolic use, is enough to defeat a total takings claim. By this standard, no regulation can ever effect a total taking" under *Lucas*. App. 28a.

Neither the historic landmark designation nor the denial of petitioners' requested building permits was at issue in the courts below or is challenged here; the issues before the Court relate solely to petitioners' takings claim.

REASONS FOR GRANTING THE WRIT

I. THE LOWER FEDERAL COURTS AND STATE COURTS ARE BADLY CONFUSED ABOUT AND IN SHARP CONFLICT OVER THE CRITICAL ISSUE OF HOW TO DETERMINE THE RELEVANT UNIT OF PROPERTY IN REGULATORY TAKINGS CASES.

In *Lucas* v. *South Carolina Coastal Council*, this Court held that a governmental regulation of property that "denies all economically beneficial or productive use of land" constitutes a *per se* or "total" taking for which just compensation is required. 505 U.S. at 1015, 1030. In his opinion for

the *Lucas* Court, Justice Scalia dropped an important footnote:

> Regrettably, the rhetorical force of our "deprivation of all economically feasible use" rule is greater than its precision, since the rule does not make clear the "property interest" against which the loss of value is to be measured. When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole. * * * Unsurprisingly, this uncertainty regarding the composition of the denominator in our "deprivation" fraction has produced inconsistent pronouncements by the Court. * * * [*Id.* at 1016-17 n.7.]

The "denominator" referred to by Justice Scalia recalls this Court's statement in *Keystone Bituminous Coal Association* v. *DeBenedictis*, 480 U.S. 470 (1987): "Because our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property 'whose value is to furnish the denominator of the fraction.' " *Id.* at 497 (quoting Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1192 (1967)).[2]

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[2] Thus, the takings fraction is x / y, where x represents the economic loss from the regulation of property and y represents the value of the property absent the regulation. A total taking occurs under *Lucas* when $x / y = 1$.

This case presents the very issue identified in footnote seven of *Lucas*,[3] and is similar on its facts to Justice Scalia's hypothetical rural tract burdened by the requirement that 90% of the property be left in its natural state. Petitioners own nine contiguous lots, and the regulation at issue here requires them to leave eight of the lots in a completely undeveloped state as a grass lawn. The question is whether the "denominator" in the takings fraction consists of all nine lots or only the eight vacant lots subject to the regulation.

As the D.C. Circuit correctly recognized in this case, "[t]he definition of the relevant parcel profoundly influences the outcome of a takings analysis." App. 8a. *See also Keystone*, 480 U.S. at 497 (determining the denominator is "one of the critical questions" in regulatory takings cases); *id.* at 514-515 (Rehnquist, C.J., dissenting) ("The need to consider the effect of regulation on some identifiable segment of property makes all important the admittedly difficult task of defining the relevant parcel."); Matt Snow, Note, *Defining the Relevant Property in Regulatory Takings Claims*, 17 J. Land Resources & Envtl. L. 403, 403 (1997) ("How the relevant parcel is defined may be the key factor in determining whether or not a taking is found."). The broader the relevant unit of property is viewed, the less likely it is that a court will find a taking. *See* App. 19a-20a (opinion of Williams, J.) ("The larger the parcel, the greater the chance that the regulated land will retain an economically viable use."). Conversely, the more narrowly a court views the relevant parcel, the more likely it is that a *Lucas* claim will be sustained. *See Lucas*, 505 U.S. at 1065 (Stevens, J., dissenting) ("The smaller the estate, the more likely that a regulatory change will effect a total taking.").

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[3] The *Lucas* Court did not have to resolve this issue since that case involved two adjacent lots both of which had been deprived of all value. Thus, it was clear in *Lucas* that the denominator in the takings equation was equal to the numerator.

Nevertheless, although the determination of the relevant parcel is an undeniably important issue, and may in fact be the dispositive factor in a regulatory takings case, this Court "has never squarely addressed the question of how courts should define the relevant geographic parcel of land, also known as 'horizontal severance.' " App. 22a (opinion of Williams, J.). *See also Stupak-Thrall* v. *United States*, 89 F.3d 1269, 1295 (6th Cir. 1996) (Boggs, J., dissenting) (determining the denominator is a "vexing matter * * * left open in the famous footnote 7 of *Lucas*"), *cert. denied*, 519 U.S. 1090 (1997); James S. Burling, *What If the Government Prohibits the Use of Only Some of Your Property—Has There Been a Regulatory Taking?*, SE18 ALI-ABA 113, 129 (1999) ("[S]even years after the *Lucas* Court explained that a denial of all use and value is a categorical taking, we still do not know how to determine the size of the relevant parcel for a takings analysis."); Marc R. Lisker, *Regulatory Takings and the Denominator Problem*, 27 Rutgers L.J. 663, 668 (1996) ("The Supreme Court has recognized the existence and importance of the issue, but has yet to provide any real guidance."). In particular, this Court has "never decided a case involving the horizontal division of land"—the very situation presented here. John E. Fee, Comment, *Unearthing the Denominator in Regulatory Taking Claims*, 61 U. Chi. L. Rev. 1535, 1545 (1994).

The lack of guidance from this Court has left the lower courts in disarray and resulted in a patchwork of conflicting decisions. *See East Cape May Assocs.* v. *State of New Jersey*, 693 A.2d 114, 128 (N.J. Super. Ct. App. Div. 1997) (noting the "presently unsettled state of New Jersey and Federal law on the question of how to determine the relevant 'property' "); Burling, *supra*, at 119 ("For the simple question of what is the relevant parcel when government prohibits the use of only a discreet segment of land, the lower courts are hopelessly split."); John M. Groen, *The Relevant Parcel Issue*, C872 ALI-ABA 167, 181 (1993) ("[T]here remains

great uncertainty as to how to define what unit of property is the appropriate whole parcel. The cases which deal with this issue are conflicting and in some cases irreconcilable."); Snow, *supra*, at 405 ("lower courts' decisions regarding the definition of relevant property are erratic and at times conflicting"). Only this Court can resolve the confusion in the lower courts. *See* Burling, *supra*, at 129 ("Until the Supreme Court reaches this issue, confusion will be the watchword in the lower courts."); Lisker, *supra*, at 706 ("Until the Supreme Court addresses this issue head-on, inconsistencies are bound to occur.").

Left to their own devices, the lower courts have adopted "various approaches to defining the relevant parcel [which] may be grouped into three categories: 1) contiguous land under a common owner; 2) multifactor analysis based on reasonable expectations; and 3) the property interest as defined by the regulation or development approach." Fee, *supra*, at 1545-46. *See also* Lisker, *supra*, at 670 (noting that the lower federal courts have developed "numerous approaches").

Under the first approach, the relevant parcel consists of all of the property owner's geographically contiguous land. *See Karam* v. *State of New Jersey*, 705 A.2d 1221, 1227-28 (N.J. Super. Ct. App. Div. 1998) (noting that some courts have "considered the composition of the denominator of the taking fraction as consisting of all of the claimant's contiguous acreage in the same ownership" but that "[t]his is not the universal rule"), *aff'd*, 723 A.2d 943 (N.J.), *cert. denied*, 120 S. Ct. 51 (1999).

Under the second approach—the one employed by the courts below—the court applies a multi-factor balancing test. Here, for example, the D.C. Circuit and the District Court considered "the degree of contiguity, the dates of acquisition, the extent to which the parcel has been treated as a single unit, and the extent to which the restricted lots benefit the

unregulated lot." App. 8a. Consideration of these factors, said the D.C. Circuit, "mirrors the approach taken by other courts in regulatory takings cases." App. 9a (citing *Forest Properties, Inc.* v. *United States*, 177 F.3d 1360 (Fed. Cir.), *cert. denied*, 120 S. Ct. 373 (1999); *K & K Constr. Co.* v. *Department of Natural Resources*, 575 N.W.2d 531 (Mich.), *cert. denied*, 525 U.S. 819 (1998)). *See also, e.g.*, *Ciampitti* v. *United States*, 22 Cl. Ct. 310, 318-319 (1991).

Under the third approach, the scope of the government's regulation or prohibition on the use of property determines the relevant parcel. *See Karam*, 705 A.2d at 1228 ("Several decisions have held that the denominator of the taking fraction is the portion of the property subject to the confiscating regulation."). Under the third approach, when the government regulation "prohibit[s] all viable economic uses of a material part of substantial, contiguous acreage owned by the same titleholder, the owner is entitled to fair compensation for the land subject to the law or regulation, even though the land continues to benefit from the remaining portion of its property." *East Cape May Assocs.*, 693 A.2d at 126.

The conflicts and confusion that abound in the lower courts are reflected in *Volkema* v. *Department of Natural Resources*, 542 N.W.2d 282 (Mich. Ct. App. 1996), *aff'd in part & disapproved in part*, 586 N.W.2d 231 (Mich.), *cert. denied*, 525 U.S. 1040 (1998). In that case, the property owners owned a 24.6-acre parcel of which six acres were rendered useless by government regulation. Two judges on the panel concluded that "plaintiffs' loss should be considered in light of the 24.6 acres, not merely the affected six acres." 542 N.W.2d at 285. The third judge, however, dissented and would have held that "where a property owner is prohibited from making use of his property, or even a portion of the property, then there is a taking with respect to the identifiable portion which cannot be used." *Id.* at 288 (Sawyer, J., dissenting). He added that

> I believe that the question posed in [footnote seven of] *Lucas* is best answered by concluding that a taking occurs where a regulation precludes the use of an identifiable, discreet piece of property, even if that property forms only a portion of a larger parcel. I do not find it relevant how large a portion of property the owner possesses. [*Id.*]

Volkema thus illustrates the fundamental disagreement that has emerged as to whether the relevant parcel in regulatory takings cases is all contiguous property held by the property owner, as the majority held, or only that portion of the property burdened by the regulation at issue, as Judge Sawyer would have held. Still other courts, such as the courts below, have eschewed these approaches in favor of a multi-factor balancing test.

A recent decision of the Federal Circuit is also indicative of the confusion in the lower courts. *See Palm Beach Isles Assocs.* v. *United States*, No. 99-5030, __ F.3d __, 2000 WL 337591 (Fed. Cir. Mar. 31, 2000). There, a group of investors ("PBIA") bought 311.7 acres of land in Florida in 1956. In 1968, PBIA sold 261 acres of the property to a developer. Many years later, the Federal Government denied PBIA permission to develop the remaining 50.7 acres. *See id.* at *1-*2. Rejecting PBIA's takings claim, the Court of Federal Claims determined that relevant parcel was the entire initial 311.7-acre parcel, even though PBIA had sold 261 of the acres in 1968. *See id.* at *2. On appeal, "[t]he Government argue[d] that since the land was purchased together, it should be treated as one parcel. PBIA should not be allowed to sever the part that is subject to the regulation from the part that is not." *Id.* at *3. The Federal Circuit, however, rejected that argument and the relevant parcel determination of the Court of Federal Claims. The Federal Circuit said that "[c]ombining the two tracts for purposes of the regulatory takings analysis involved here, simply because at one time they were under common ownership, or because one of the

tracts sold for a substantial price, cannot be justified." *Id.* at *6.

In short, the relevant parcel issue is an issue of critical importance in regulatory takings cases, as this Court has acknowledged. The absence of guidance from this Court, however, has led the lower courts to develop no fewer than three inconsistent methodologies for determining the denominator in takings analysis, and has resulted in a host of irreconcilable decisions. It is unacceptable that property rights under the Takings Clause should be so unpredictable and depend so heavily upon the jurisdiction in which property is located.

II. THE D.C. CIRCUIT'S ANALYSIS AND RESOLUTION OF THE RELEVANT PARCEL ISSUE IN THIS CASE CONFLICTS WITH THE DECISIONS OF OTHER APPELLATE COURTS.

The D.C. Circuit's application of a multi-factor balancing test to hold that all nine of petitioners' lots constituted the relevant unit of property for takings analysis purposes squarely conflicts with the decisions of several other courts of appeals that have held the relevant parcel in a regulatory takings case to be only that portion of the land subject to the regulation at issue.

In *Machipongo Land and Coal Co.* v. *Commonwealth of Pennsylvania*, 719 A.2d 19 (Pa. Commw. Ct. 1998), Pennsylvania barred Machipongo from mining its coal contained within a 157-acre tract of a larger 2,037-acre parcel. Two other property owners, Erickson and Naughton, were denied permission to mine 27 acres of a 1,350-acre parcel they owned. Pennsylvania argued that the property owners had not been deprived "of all beneficial use of their land because the designated area only comprises 8% of the total land owned by Machipongo and 2% of the land owned by Erickson and Naughton." *Id.* at 22.

The *Machipongo* panel noted that numerous courts

> have addressed the problem of deciding how the denominator is determined in a regulatory takings case, but they have never agreed on the appropriate method for determining that portion of the fraction and have provided little in the way of guidance. Essentially, though, they have all utilized one of the following three approaches: 1) the contiguous land under a common owner approach; 2) the property interest as defined by the regulation; and 3) the multi-factor analysis. [*Id.* at 26.]

Pennsylvania urged the court to adopt the first approach, but the court declined, citing the "facial unfairness in this approach." *Id.* at 27. The court also rejected the third approach for "fail[ing] to offer either regulators or property owners any certainty as to whether a regulation will result in a taking." *Id.* at 27-28. The court concluded that "the property interest by regulation approach is the best one to determine the denominator," with the proviso that "[i]f the regulated land had no value prior to the regulation because it had no viable use, it could not serve as the denominator and there would be no taking." *Id.* at 28.[4] The court explained that "[t]his approach is best because it fosters predictability, focuses on the effect of the governmental regulation on the property and not on the circumstances of the property owner, and results in fairness because it treats all property owners the same." *Id.* Accordingly, the *Machipongo* court held that "only the regulated land is to be considered in determining the denominator." *Id.*

Applying the *Machipongo* approach to this case, only the properties burdened by the regulation—the eight undeveloped lots comprising the lawn—would be considered in the

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[4] The court noted (719 A.2d at 28 n.22) that this approach was suggested in the *Chicago Law Review* article authored by John Fee. *See supra* at 10.

takings analysis. And the court's proviso would not apply because the eight lots clearly could support economically viable uses absent the historic landmark designation. Therefore, a square conflict exists between *Machipongo* and the decision below—the two courts would have decided this case differently.

The facts of *Twain Harte Associates, Ltd.* v. *County of Tuolumne*, 265 Cal. Rptr. 737 (Cal. Ct. App.), *review denied* (Cal. Apr. 4, 1990), are strikingly similar to the case at hand, yet the court's relevant parcel determination was directly contrary to that of the D.C. Circuit here. At issue in *Twain Harte* was an 8.5-acre parcel, of which 6.8 acres supported a shopping center and 1.7 acres were undeveloped. The property owners had purchased the 8.5 acres as a unit following the construction of the shopping center. After acquiring the property, the owners applied for permission to split the 6.8-acre parcel from the remaining 1.7 acres, but the County denied permission. The County subsequently enacted an ordinance designating the 1.7-acre plot as "open space"—thereby barring the building of any structures on the property. *See id.* at 739-740.

Against the property owners' claim that the undeveloped 1.7-acre plot had been taken, the County argued that the 6.8-acre parcel containing the shopping center had to be considered along with the 1.7 acres for takings purposes, and hence the property owners "suffered no substantive economic deprivation because the 8.5-acre parcel has upon it an operating shopping center of significant size and undoubted monetary benefit." *Id.* at 744. The California Court of Appeal, however, flatly rejected the County's argument and held that "the law does not demand the entire 8.5-acre parcel be treated as a whole" for takings purposes. *Id.* at 745.

The decision below clearly conflicts with *Twain Harte*. In both cases, undeveloped land abutted land bearing income-producing structures. But the *Twain Harte* court, unlike the

court below, held that the undeveloped land—the land burdened by the no-development regulation—could be viewed by itself for takings analysis. Notably, the case for treating the eight vacant lots here as distinct from the lot with the apartment building is even stronger than was the case for separating the two parcels in *Twain Harte*, because there the property owners' application to split the 1.7-acre plot from the rest of the property was *denied*, *see id.* at 739, whereas here permission to subdivide was *granted*.

Other courts have also sustained takings claims where the property owners had unburdened land contiguous to land taken by government regulation. In *Boise Cascade Corp.* v. *Board of Forestry*, 935 P.2d 411 (Or. 1997), Boise Cascade applied to the Board of Forestry for permission to log a 64-acre parcel of its land. The Board denied the request as to 56 of the acres due to the presence of spotted owl nests on the property, but permitted the other eight acres to be logged. *See id.* at 414-415. The trial court dismissed Boise Cascade's takings claim on the ground that it had failed to state a claim for relief. The Oregon Supreme Court disagreed with that assessment, however, and held that Boise Cascade's contention that it had been deprived "of the only economically viable use of approximately 56 acres of merchantable timber" stated a valid takings claim. *Id.* at 420.

Similarly, in *Corrigan* v. *City of Scottsdale*, 720 P.2d 528 (Ariz. Ct. App. 1985), *aff'd in relevant part*, 720 P.2d 513 (Ariz.), *cert. denied*, 479 U.S. 986 (1986), Corrigan owned 5,738 acres of undeveloped land made up of three contiguous parcels of 4,800, 608, and 330 acres, respectively. The City enacted an ordinance that had the effect of prohibiting any new development within 74%-80% of the 4,800-acre parcel, but did not affect the two smaller parcels. *See* 720 P.2d at 530-532. On these facts, the Arizona Court of Appeals concluded that "it is clear that the Hillside Ordinance prevents any development whatsoever on the largest parcel of Corrigan's land. This is a taking." *Id.* at 539. The court

therefore held that the ordinance resulted in "an unconstitutional taking of appellant's property without just compensation." *Id.* at 540. As in *Corrigan*, the fact that petitioners have one lot unaffected by regulation adjacent to eight that are should make no difference or obscure the fact that *this* is a taking.

III. THE D.C. CIRCUIT ERRED IN HOLDING THAT ALL NINE OF PETITIONERS' LOTS SHOULD BE TREATED AS A SINGLE PARCEL FOR TAKINGS ANALYSIS.

The D.C. Circuit was wrong to hold that all nine of petitioners' lots must be viewed as one unit of property for purposes of analyzing petitioners' *Lucas* claim. Instead, the court should have assessed the economic impact of the historic landmark designation as to each of the eight vacant lots without considering the lot with the apartment building.

For the reasons identified by Judge Williams (*see supra* at 6-7), the multi-factor balancing test applied by the District Court and the D.C. Circuit in this case is not a satisfactory method of determining the relevant parcel. *See* App. 24a ("the factors that the majority applies in making the decision * * * strike me as uninformative and largely irrelevant"). *See also Machipongo*, 719 A.2d at 27-28 (concluding that the multi-factor approach "fails to offer either regulators or property owners any certainty as to whether a regulation will result in a taking"); Fee, *supra*, at 1537 (noting that courts have "applied these factors inconsistently, making regulatory taking determinations unpredictable and often arbitrary").[5] Instead, the D.C. Circuit should considered the relevant

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[5] As this Court has commented, multi-factor balancing tests, such as that adopted by the D.C. Circuit here, are "hard to apply," "jettison[] relative predictability for the open-ended rough-and-tumble of factors," and "invit[e] complex argument in a trial court and a virtually inevitable appeal." *Jerome B. Grubart, Inc.* v. *Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 547 (1995).

parcel to be that portion of the property affected by the regulation at issue, provided that the affected portion could itself sustain an economically viable use. *See* Fee, *supra*, at 1562 ("Where the total restrictions on development affect a significant enough segment of land that it could be independently developed for a profit, the principles of fairness and justice underlying the Fifth Amendment require that the owner be compensated for his loss. Such a case would in principle be no different than *Lucas*.").[6]

If the District of Columbia had simply taken petitioners' eight lots with its eminent domain power to preserve open space in Woodley Park, there is no question it would have had to pay just compensation, regardless of the fact that petitioners have an adjacent lot that generates income. It should make no difference that petitioners have been allowed to keep the property as an undeveloped lawn. *See Groen*, *supra*, at 180 ("[C]ompensation should be made when regulation is applied to deny all use of that portion of a larger parcel. * * * [T]here is no practical difference to the owner between a condemnation of that portion and a negative regulation which achieves the same result").

Another approach superior to the D.C. Circuit's factor-juggling was suggested in footnote seven of *Lucas* itself. There, the Court stated that "[t]he answer to this difficult question [of the relevant parcel] may lie in how the owner's reasonable expectations have been shaped by the State's law of property—*i.e.*, whether and to what degree the State's law has accorded legal recognition and protection to the particu-

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[6] This approach does not go so far as to prevent government from enacting reasonable property use restrictions. Thus, for example, a set-back ordinance restricting construction within a short distance of a street would not require compensation, because the small strip of land subject to the regulation could not on its own be put to an economically productive use. *See* Fee, *supra*, at 1559.

lar interest in land with respect to which the takings claimant alleges a diminution in (or elimination) of value." *Lucas*, 505 U.S. at 1017.

Here, the District of Columbia certainly did recognize the eight lots as legally separate units of property on which petitioners could build. First, in 1988, the District of Columbia granted petitioners' application to subdivide the property—which required a governmental determination that petitioners had complied with the District of Columbia's substantive subdivision regulations. *See* 10 D.C.M.R. §§ 2700-2799; *id.* at § 2701.1 ("No land or ground in the District of Columbia shall be subdivided for purpose of creating a lot of record, except in conformity with this chapter.").

Second, following the subdivision of the lots, the District of Columbia—as the D.C. Circuit noted—"taxed Lots 107 through 114 at a higher rate" than Lot 106. App. 12a. The reason for the higher tax rate on the eight lots is telling: it "reflect[s] the District of Columbia's assessment that these lots are vacant developable land." App. 12a. *See* D.C. Cir. J.A. 442 ("the assessment department of the District of Columbia [is] treating the property as developable lots"); *id.* at 445 (same). *See also* D.C. Code §§ 47-812, 47-813 (applying a higher property tax rate to unimproved property than to improved property); D.C. Real Estate Reporter, *The Regulation of Real Estate in the District of Columbia* 81 (1994) (purpose of the higher tax rate on unimproved property "is to encourage owners of 'vacant land and buildings to develop or rehabilitate their properties and place them on the rental market' ") (quoting former Mayor Sharon Pratt Kelly).

And third, in 1989, the zoning and structural engineering divisions of the DCRA granted zoning approval for petitioners' proposed town-house construction.[7]

In sum, as of 1989, the District of Columbia had granted regulatory permission to subdivide the original lot into the present nine lots; granted zoning approval for the proposed development; commenced taxing the eight vacant lots at a higher rate on account of their development potential; and failed for the 28 years that petitioners had owned the lawn to designate it a landmark. Accordingly, when the District of Columbia applied the regulatory imposition, petitioners had an entirely reasonable belief that the eight lots were distinct and developable properties.[8]

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[7] It is no answer to say that petitioners should have predicted that their properties would someday be declared an historic landmark. Cathedral Mansions South dates from the 1920s, and petitioners purchased the apartment building and the surrounding property in 1961, yet it was not until 1989—some 28 years later and only after petitioners commenced the development process—that the residents of Woodley Park and the District of Columbia were struck with the epiphany that the grass lawn is itself an historic landmark.

[8] *See* Laura M. Schleich, *Takings: The Fifth Amendment, Government Regulation, and the Problem of the Relevant Parcel*, 8 J. Land Use & Envtl. L. 381, 402 (1993) ("An appropriate and accurate measure of the relevant parcel should isolate the property taken at the moment of regulation.").

IV. THE D.C. CIRCUIT'S HOLDING THAT PETITIONERS' VACANT LOTS RETAINED ECONOMICALLY VIABLE USES—DESPITE THE REQUIREMENT THAT THE LOTS BE MAINTAINED AS A LAWN—CONFLICTS WITH THE RULE OF *LUCAS* AND THE DECISIONS OF OTHER APPELLATE COURTS.

The second question presented relates to the D.C. Circuit's alternative holding that, even if petitioners' eight vacant lots were to be viewed as separate from the ninth lot, there still was no taking under *Lucas* because the eight lots have not been deprived of all economically viable use. Remarkably, the court so held even while acknowledging that "[t]he record contains a finding by the Mayor's agent that any construction that destroyed the lawn would be incompatible with the lawn's status as a historic landmark." App. 13a. This holding cannot be reconciled with the rule of *Lucas* or the decision of other courts applying the *Lucas* rule. As Judge Williams said, "[i]t is hard to imagine what 'economically viable' use that constraint leaves, unless the majority means the very barest thread of value, yielded by some thoroughly bucolic use, is enough to defeat a total takings claim. By this standard, no regulation can ever effect a total taking" under *Lucas*. App. 28a.[9]

In *Lucas*, David Lucas owned two beachfront lots on which he planned to build single-family homes, but the South

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[9] As noted above, although Judge Williams fundamentally disagreed with the takings analysis applied by the majority in this case, he concurred in the judgment because "[t]he majority's disposition is—with one important exception—in general accord with the current opinions of the Supreme Court." App. 17a. The majority's alternative holding on the *Lucas* issue is that "important exception." *See* App. 27a-28a (the majority "gratuitously takes an even harsher stance against compensation than does present law" in its holding that "so long as the lawn is untouched, 'economically viable' uses are permitted").

Carolina Coastal Council barred him from erecting any permanent habitable structures on the lots, thus requiring him to leave the land undeveloped. This Court confirmed that compensation is required when government enacts "regulations that leave the owner of land without economically beneficial or productive options for its use—*typically, as here, by requiring land to be left substantially in its natural state*." 505 U.S. at 1018 (emphasis added). Likewise, the District of Columbia has here required petitioners to leave each of their eight vacant lots "substantially in its natural state"—each lot must be maintained as a grass lawn.

Following *Lucas*, in *McQueen* v. *South Carolina Coastal Council*, 496 S.E.2d 643 (S.C. Ct. App. 1998), *cert. granted* (S.C. Mar. 18, 1999), the Coastal Council denied the property owner permission to build on his two coastal lots. Concluding that "the case at bar epitomizes a remarkable similitude to *Lucas*," the South Carolina Court of Appeals held that "McQueen has suffered a textbook taking" under *Lucas* since "the Coastal Council's denial of McQueen's permit applications for the two lots deprives him of all economically beneficial use of the land." *Id.* at 648, 650. This case, too, is a textbook *Lucas* violation; petitioners were denied permission to build single-family townhouses on their vacant lots and were told that they could not make any use of the lots that would disturb the lawn. Thus, the decision of the court below conflicts with the *Lucas* rule and *McQueen*.

In *Del Monte Dunes at Monterey, Ltd.* v. *City of Monterey*, 95 F.3d 1422 (9th Cir. 1996), *aff'd*, 526 U.S. 687 (1999), the City denied Del Monte's application for a permit to develop its ocean-front property into a residential complex. The Ninth Circuit held that Del Monte had been deprived of all economically viable use of its property within the meaning of *Lucas*, explaining that "[t]he jury essentially accepted Del Monte's argument that the City forced Del Monte to bear the burden of creating open space for the public to enjoy." 95

F.3d at 1434.[10] The same principle supports the conclusion here that the District of Columbia's requirement that petitioners' keep their eight vacant lots as open space constitutes a taking. *See* App. 26a-27a (opinion of Williams, J.) (questioning whether the historic landmark designation was "little more than a cloak by which the citizens of Upper Northwest Washington have secured some parkland on the cheap").

Finally, in *Isla Verde International Holdings, Inc.* v. *City of Camas*, 990 P.2d 429 (Wash. Ct. App. 1999), the Washington Court of Appeals held that the City's requirement that the developer of a new residential community set aside 30% of the development as open space was a taking. As the court explained:

> Here, the set-aside ordinance requires Isla Verde to dedicate a significant portion of its property for a public benefit, wildlife preservation, thus limiting Isla Verde's right to improve that property. Such a governmental interference with a fundamental property right is a form of exaction. [*Id.* at 436 (citing *Lucas*).]

See also Ehrlich v. *City of Culver City*, 19 Cal. Rptr. 2d 468, 475 (Cal. Ct. App.) ("Property is generally deprived of all economically beneficial use where construction is banned entirely, such as when the property is required to remain as open space."), *review denied* (Cal. Aug. 26, 1993), *GVR'd*, 512 U.S. 1231 (1996), *in light of Dolan* v. *City of Tigard*, 512 U.S. 374 (1994).

Although it should be true as a matter of law (not to mention common sense) that requiring a property owner to

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[10] The Ninth Circuit also reaffirmed this Court's admonition that "compensation is required where regulations 'leave the owner of land without economically beneficial or productive options for its use—typically . . . by requiring land to be left substantially in its natural state.' " 95 F.3d at 1432 (quoting *Lucas*, 505 U.S. at 1018) (ellipses in *Del Monte*).

maintain his property in a completely undeveloped state as a grass lawn denies all economically productive use of the property, the record in this case—contrary to the D.C. Circuit's assertion—does support the conclusion that a *Lucas* violation occurred here. Petitioners' appraiser testified that "[g]enerally speaking, * * * lawn is not an economic use of property" and that here "the lawn has no economic value." D.C. Cir. J.A. 447. He further testified that requiring petitioners to keep the properties as a lawn actually results in an economic loss to petitioners due to taxes, insurance, and maintenance costs. *See id.* at 452. Finally, he observed that the lawn does not add to the rental income received by petitioners from Cathedral Mansions South because the apartment building is rent controlled. *See id.* ("Without the ability to increase rents, the addition of Lots 107-114 as a lawn to Lot 106 has no positive economic benefit.").

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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